

Canon Law and Common Sense

Rev. Anthony Cekada

WHY TRADITIONAL CATHOLICS ARE NOT OUTLAWS

typical diocese these days is the scene of all sorts of dangerous craziness. Priests attack defined Catholic teachings on faith and morals. Nuns push for women's ordination. Masses are celebrated featuring puppets, balloons, clowns and dance. The nearly-empty seminary and nominally-Catholic university are hotbeds of religious subversion.

Every once and a while, however, the men responsible for this state of affairs take time out. The bishop or some diocesan official will assume a serious mien and issue a solemn warning: There is a chapel in our diocese, he says, where a priest offers the traditional Latin Mass. This is illicit and violates canon law, so beware!

On the flip side of the same coin, there have always been a few people in the traditional movement who vehemently oppose the New Mass and Vatican II, but who nevertheless condemn all (or most) traditional Catholic priests or chapels as "illicit" or "against canon law."

Typically, some layman with an ax to grind will get hold of an English paraphrase of the Code of Canon Law (the official text exists only in Latin), and, like a Protestant handling scripture, will treat his discovery as a handy source for "proof-texts" he can use to dismiss everyone else in the traditional movement as "non-Catholic." He has no idea that, as with scripture, there are authoritative principles and rules which must be followed for applying the particulars of the Code. And as the would-be lay canon lawyer circulates his articles condemning everyone else for not adhering literally to the canons, it never occurs to him that his own project is equally "illicit" — for his writings do not bear the official Imprimatur required by Canon 1385.

In either case — statements from the modernist establishment or polemics from self-styled lay canonists — Catholics who go to a traditional Mass sometimes find such accusations troubling. Good Catholics, we know, should try to obey the law. Is what we do really against canon law, or somehow illicit, and therefore wrong?

Common sense tells us that the answer is no. Sacrilege and doctrinal error abound. It hardly seems reasonable that the thousands of rules intended for ordinary times in the Church would all still apply in face of such an extraordinary situation.

Most laymen in the traditional movement instinctively adopt this common-sense approach. Without realizing it, they've put into practice a very common-sense principle that Catholic canonists (canon law experts) have always used for applying canon law: the principle of equity.

Equity (one could also call it "fairness") recognizes that following the letter of a church law can, in certain extraordinary situations, be both harmful and wrong. Traditional Catholics who understand how equity is applied will be well prepared to explain why their course of action is proper.

Here we will consider:

- (1) The purpose of church law, and the principle of equity.
- (2) How equity applies to the situation of traditional Catholic priests and chapels.

I. Purpose & Principles

To apply church laws intelligently, one must first understand the fundamental principles. Here are a few important considerations.

A. The Common Good

Canon law manuals usually begin with St. Thomas Aquinas's classic general definition of law: "an ordinance of reason for the common good promulgated by the person who has care of the community."

Theologians divide law into two broad categories:

- (1) Divine law. This in turn is divided into the eternal law (God's reason and will), the natural law (the knowledge of good and evil written on every man's heart), and the divine-positive law (the Old and New Testaments).
- (2) Human law, which is divided into ecclesiastical law and civil law.

Church law, therefore, falls under the heading of human law.

By definition all law is directed toward the common good. In the case of ecclesiastical law, says the theologian Merkelbach, the specific “common good” the Church intends is “the worship of God and the supernatural sanctification of men.”¹ This is the overall aim or goal of all the Church’s laws.

When discussing the general principles of church law, moreover, all the great Catholic moral theologians and canonists stress that specific laws are supposed to work justice — not just legal justice (strict conformity to the letter of the law), but natural justice (what we truly have a moral right to).

The great canonist Cicognani (later a Cardinal) therefore says that applying the law is “the art of all that is good and equitable.” This art, he says, “ought to consist in a correction of the strict letter of law that works an injury, or when a positive human law is not in harmony with the principles of natural justice, or again when it is in itself so deficient that what is legally right becomes morally wrong.”²

Like other authors, Cicognani points out a problem: “A human lawgiver is never able to foresee all the individual cases to which a law will be applied. Consequently, a law, though just in general, may, taken literally, lead in some unforeseen cases to results which agree neither with the intent of the lawgiver nor with natural justice, but rather contravene them. In such cases the law must be expounded not according to its wording but according to the intent of the lawgiver and according to the principles of natural justice.”³

B. Equity: Its Necessity

This brings us to a principle of singular importance for applying canon law nowadays: equity.

Equity (sometimes also called *epikeia* or *epiky*) is typically defined as follows: “The benign application of the law according to what is good and equitable, which decides that the lawgiver does not intend that, because of exceptional circumstances, some particular case be included under his general law.”⁴ Others like the Dominican canonist and moral theologian Prümmer add that equity is an interpretation of the mind of the lawgiver, “who is presumed to be unwilling to bind his subjects in extraordinary cases where the observance of his law would cause injury or impose too severe a burden.”⁵

The reason theologians allow equity to be used harks back to our definition of law: an ordinance of reason for the common good. Indeed, theologians say that neglecting to apply equity when the common good is at stake is morally wrong. A person subject to the law may in certain cases, says Merkelbach,

“act outside the letter of the law, to wit, when the letter of the law would be harmful to the common good.... Therefore in a case where the observance of the law would be harmful to the common good, it should not be obeyed.”⁶ This is also the teaching of St. Thomas, who says: “In certain cases to follow [a law] is against the equality of justice and against the common good which the law intends.... In such cases it is bad to follow the law; it is good to set aside its letter and follow the dictates of justice and the common good.”⁷

Nor does one who applies equity violate the law. On the contrary, he “acts licitly.”⁸ Such an application of law “is legal, that is lawful, although it disagree with the strict letter of the law.”⁹

Cicognani observes: “If equity among the pagans was not unimportant... much more ought equity to obtain in ecclesiastical discipline, in canon law, and in the Church. For the Church, apart from the fact that she is a mother, merciful, holy, and indulgent, has as her end the salvation of souls, the supreme law, which frequently requires the correction of certain other laws.”¹⁰

Cicognani here has alluded to an old adage in church law: *Salus animarum suprema lex* — the salvation of souls is the supreme law. It is divine law — God’s will and goal for us — that souls be saved.

What if a lower type of law sometime conflicts with a divine law? “The greater obligation prevails,” say the moralists McHugh and Callan, “and the lesser obligation disappears.”¹¹

Equity, finally, is not license to set aside all church laws. While it seeks to serve justice, it is also related to prudence — selecting and putting into practice means appropriate to achieving some good end, or avoiding some evil. Specifically it is related to a potential part of prudence called the sense of exception (or *gnomé*) which controls our proper application of rules and our appeal to higher principles, should it become necessary to set a rule aside.¹²

C. Summary of Principles

We’ll sum up the principles discussed so far:

- The goal of all law is to promote the common good.
- Canon law falls under the heading of human law.
- The common good the Church intends for canon law is “the worship of God and the supernatural sanctification of men.”

- A specific human law may be just in general, but taken literally in circumstances unforeseen by the lawgiver may in fact contravene either natural justice or what the lawgiver intended.
- In such a case one may apply equity — deciding that, because of the harm which would result, the lawgiver didn't intend a particular case to be included under his general law.
- In certain circumstances where harm to the common good would result from a literal application of a law, it is bad to follow the law.
- Applying equity is licit or lawful.
- The salvation of souls is the supreme law.
- When a lower law conflicts with the divine law, the obligation to observe the lower law disappears.
- The application of equity to a law must be controlled by prudence.

II. Practical Application

We now turn to apply these principles to the status of traditional Catholics vis-à-vis the Code of Canon Law.

Our Lord wills that we be saved, and He instituted the seven sacraments as the principal means for us to sanctify ourselves and obtain salvation. In virtue of the divine law, therefore, Catholics have a right to the sacraments.

The human law of the Church (canon law) protects that fundamental right, and at the same time places certain restrictions on how it can be exercised. (To confer sacraments legally in a diocese, for instance, the Code requires that a priest obtain faculties from the bishop.) The legislator promulgated all these restrictions, and indeed the whole Code, on the assumption that a normal situation obtained throughout the Church.

The situation for Catholics since the Second Vatican Council can hardly be termed normal. By Vatican decree, a new Mass, protestantized and stripped of sacredness, has been introduced into our parish churches, together with the officially-sanctioned and utterly sacrilegious practice of Communion in the hand. Bishops and pastors — the men who under the Code would have possessed the power to grant other priests faculties to confer sacraments — tacitly condone or explicitly promote doctrines which contradict the Catholic faith.

If in the face of this disaster you insist that equity does not apply and that all the Code's provisions on sacramental faculties still bind, you arrive at one of two practical alternatives:

(A) Traditional Catholics must approach the Novus Ordo establishment to obtain faculties for sacraments; or

(B) Because traditional Catholics cannot obtain the faculties and permissions required by canon law, they must henceforth forego receiving any sacraments, apart from baptism conferred in proximate danger of death.

A. Faculties from Modernists

As regards the first alternative, it is hardly reasonable to imagine that we Catholics who have a right by divine law to Catholic sacraments and Catholic teaching would have an obligation by canon law to request permission for these things from the very men who took them away in the first place.

The same Code of Canon Law that lays down requirements for granting faculties also protects Catholics from these wolves in sheep's clothing. Church officials who have manifestly defected from the Catholic faith lose not only all jurisdiction in the Catholic Church (c. 188.4), but even their membership in it.

These points have been amply discussed in other articles and need not detain us here. Another old adage, however, is to the point: *Nemo dat quod non habet* — No one gives what he himself does not possess.

B. No Sacraments at All

The self-appointed lay canonists, on the other hand, propose the general principle that to confer sacraments without the requisite conditions and faculties foreseen by the Code is “illicit” and always impermissible. But he who applies this principle with complete consistency ends up with no sacraments at all.

The lay writers do not realize this, of course, because they don't know enough about the particulars of the canons dealing with the sacraments. They believe that Baptism, and (maybe) Matrimony would somehow still be “licit” under their interpretation of the Code. They're wrong.

Take Baptism, for instance. To administer it validly (i.e., so that it “works”), all you need is someone to pour the water and recite the essential form. But if

you insist on meeting each and every legal requirement of the Code for a sacrament, here is what confronts you:

- Canon 755.1 prescribes that, except in danger of death, baptism must always be conferred solemnly (i.e., with the anointings and other prescribed rites).
- The Code reserves the right to perform solemn baptism to the canonical pastor, his delegate or the Ordinary (c. 738.1), although in case of necessity, the Ordinary's permission may be presumed.
- The priest, in any case, must use solemnly blessed baptismal water (containing the oils blessed on Holy Thursday by the Ordinary) for a solemn baptism (c. 757.1).
- It is "permitted" to confer private baptism (i.e., using just the water and the essential form), but only in danger of death (c. 759.1).
- Except in the case of adult converts being baptized conditionally, the Ordinary is forbidden to permit private baptism outside of danger of death (c. 759.2).

Now in terms of the foregoing, let us apply the principle the lay "experts" want us to follow in our current situation ("nothing illicit!"), and watch the sacrament of Baptism disappear:

- It is illicit to confer a solemn baptism, since there is no canonical pastor to confer it, and no Ordinary whose permission an itinerant priest could presume — even assuming a priest could be found who was not suspended from performing sacred rites by some other provision of the Code.
- Baptismal water would be illicit unless it had been previously consecrated using holy oils — which themselves could not be obtained, since there would be no Ordinary capable of blessing them licitly.
- One could baptize someone privately, of course — but that would be illicit too, unless the person were in danger of death.

Insist on the literal application of each and every article in the Code, therefore, and your children will go through life without Baptism. And don't even think about giving them scapulars or rosaries and hoping for the best — because according to the letter of the law, only a priest with special faculties from the Ordinary could bless these items licitly. All you can do is pray that when your children are old and ready to die, someone will remember to baptize them — but only if it can be done "licitly," of course, according to your strict interpretation of Canon 759.

C. Equity and Prudence

Applying equity permits Catholics to avoid the positive evils and pharisaical absurdities of the two positions outlined above, one of which would compel us to deal with modernists, the other of which would logically force us to do without the sacraments. In exceptional cases, say the moralists McHugh and Callan, “legalism insists on blind obedience to the law books, but the higher justice of epikeia or equity calls for obedience to the lawgiver himself as intending the common welfare and fair treatment of the rights of each person.”¹³

As we’ve seen above, the common good the Church intends for canon law is “the worship of God and the supernatural sanctification of men.” The sacraments are the principal means the Church possesses for achieving this end. It is therefore entirely proper to apply equity to those provisions of the Code which, if applied to our own extraordinary circumstances, would frustrate the lawgiver’s intent by actually preventing Catholics from receiving the sacraments when they have a right to them.

This does not mean that all the provisions of the Code are negotiable. Equity, canonists and moral theologians emphasize, must be controlled by prudence and a proper sense of exception. It enables us to do the essentials, but also prevents us from making up our own rules as we go along. Here are some examples.

- **Baptism.** A proper application of equity allows a traditional priest to confer solemn baptism, even though delegation would ordinarily be required. Equity would dictate, however, that he observe the other rules on baptism the Code lays down concerning matters such as record-keeping, godparents and rubrical requirements.

- **Penance.** Equity (in addition to other, more specific provisions in the Code¹⁴) permits a traditional priest to grant absolution to a penitent, even though under normal circumstances faculties from the Ordinary would be required for validity. The priest could do so under the heading of supplied (rather than ordinary) jurisdiction, in view of the canonist Cappello’s principle that “the Church, by reason of her very purpose, must always take into account the salvation of souls, and therefore is bound to provide everything which depends on her power.”¹⁵ Other provisions of the Code (regarding the seal, the proper place, etc.) must continue to be observed.

- **The Mass.** Equity permits opening a public chapel where Catholics can have access to the Mass, even though the law requires the Ordinary’s permission. A

correct understanding of equity would insist that the Code's requirements on the physical objects needed for celebrating Mass still be followed.

- **Holy Orders.** Catholics need sacraments to save their souls, and priests provide the sacraments. Equity therefore allows a traditional Catholic bishop to ordain priests without dimissorial letters (canonical permission from an Ordinary), and to consider the technical suspension which would otherwise result to be null and void. On the other hand, it would be grossly imprudent and utterly contrary to equity for a bishop to ordain someone who had not received the lengthy scholastic and spiritual formation the Code of Canon Law lays down.

Equity, then, is not license. It keeps one eye on the common good canon law intends — “the worship of God and the supernatural sanctification of men” — and the other eye on the particulars of individual laws fashioned by the wisdom of the Church. Equity seeks prudently to follow as much of canon law as possible, while still ensuring the purpose of the law is fulfilled.

* * * * *

“Search the scriptures; the same are they that give testimony of me.” Search the scriptures not to look for “proof-texts,” to be sure, but to seek the Savior. A clear picture of Our Lord emerges, full of mercy and common sense, and burning with zeal for the good of souls.

How odd that some Catholics should so distort Christ — or His Mystical Body — as to make of Him a Pharisee, “binding heavy burdens and laying them on men’s shoulders.” But no, this is the Savior who healed on the Sabbath, spoke to the Samaritan woman, and permitted His disciples to glean wheat on the day of rest, “for the Sabbath is for man, and not man for the Sabbath.”

Just as a study of Scripture will show the true and adorable face of Christ, so too will a study of the law of the Catholic Church that is faithful to authentic commentaries and sources. The same reasonable, wise, and merciful living Christ emerges from either text.

Equity — fairness in the application of law — enables the Catholic never to lose sight of Our Lord, surrendering neither to the legalists of the left nor the Pharisees of the right. Our Lord is Jesus Christ, the same “yesterday, and today, and the same forever” — in the pages of Scripture or the letter of the law, on the lips of the priest or on your tongue in Holy Communion, the “fairest of the children of men.” (St. Cyril of Alexandria.)

(*Sacerdotium* 7, Spring 1993).

Notes

1. B. Merkelbach, *Summa Theologiae Moralis* (Paris: Desclée 1946), 1:325.
2. A. Cicognani, *Canon Law* (Westminster Md.: Newman 1934), 13.
3. *Canon Law*, 15.
4. Cicognani, 15.
5. D. Prümmer, *Manuale Theologiae Moralis* (Barcelona: Herder 1949) 1:231.
6. *Summa Theol. Mor.*, 1:296. My emphasis.
7. *Summa Theol.* II–II.120.1.
8. Merkelbach, 1:296.
9. Cicognani, 15.
10. *Canon Law*, 17.
11. J. McHugh & C. Callan, *Moral Theology* (New York: Wagner 1929), 1:140–1.
12. See P. Palazzini, ed., *Dictionary of Moral Theology* (Westminster MD: Newman 1962), 981–83.
13. McHugh & Callan, 1:411.
14. E.g., Canon 209 (supplied jurisdiction in cases of common error, or positive and probable doubts of law or fact).
15. F. Cappello, *Tract. de Sacramentis* (Rome: Marietti 1944), 2:349.